United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1063

UNITED STATES COURT OF APPEALS

For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Appellee,

v.

WYADELL EDMONDS,

Defendant-Appellant.

Appeal from an Order of the United States District Court for the Southern District of New York

BRIEF and appendix OF DEFENDANT-APPELLANT

WYADELL EDMONDS

DANIEL J. KORNSTEIN
BAER & McGOLDRICK
Attorneys for Defendant-Appellant
460 Park Avenue
New York, New York 10022
(212) 758-0404

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	Docket Number 76-1063
WYADELL EDMONDS,	:	
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT
WYADELL EDMONDS

This is an appeal by defendant-appellant Wyadell Edmonds from an order of the District Court for the Southern District of New York (Owen, D.J.) denying his motion to withdraw a prior appeal without prejudice.

Preliminary Statement

This appeal requires this Court to decide: (1) whether a district court can refuse to allow an indigent to conduct his own appeal; (2) what standards of "assistance of counsel" apply to criminal appeals; and (3) whether such standards apply to counsel assigned to indigent clients as well as to counsel who are privately retained.

This criminal case is before this Court in an unusual posture, and for a second time, because an appeal

from the trial ("the trial appeal") was decided affirming the conviction and sentence below while this appeal ("the pending appeal") from the District Court's denial of appellant's motion to withdraw his trial appeal was pending.

After appellant's rejected counsel noticed an appeal from appellant's conviction, but before the trial appeal was briefed or argued, appellant moved pro se, by application to this Court, to withdraw his trial appeal without prejudice. The District Court denied appellant's motion before the trial appeal was argued or decided, but appellant was not notified of the denial until after the trial appeal was briefed. He then filed a second notice of appeal, pro se, from the District Court's denial of his motion to withdraw the trial appeal without prejudice. The notice of appeal from the order denying withdrawal of the trial appeal was filed before this Court decided the trial appeal affirming the judgment of conviction and the sentence below. 535 F.2d 714 (2d Cir. 1976).

To afford appellant an opportunity to effectively prosecute a trial appeal, the affirmance of his conviction and sentence should be vacated or this case set down for rehearing.

Issues Presented

1. In view of the explicit language of Fed. R. App. P. 42 lodging exclusive jurisdiction of such a motion in the court of appeals, does a district court lack jurisdiction even to consider a motion by an appellant to withdraw an appeal without prejudice after such an appeal has been docketed by the court of appeals?

2. Does the district court deprive an appellant of his right to self-representation when it denies the appellant's pro se motion to withdraw his trial appeal without prejudice, by which motion appellant sought to prosecute his trial appeal pro se?

3. Where there are no countervailing arguments on the merits against granting a motion to withdraw an appeal without prejudice, does a district court act arbitrarily and capriciously and abuse its discretion when it denies the motion?

4. Is an appellant denied the effective assistance of counsel when his rejected counsel: (a) does not fully consult and discuss appellate tactics with appellant; (b) refuses, without asking or getting appellant's permission, to advance a non-frivolous contention that appellant wanted to be made, and (c) does not inform apellant of the outcome of the trial appeal?

5. Does inadequate legal representation given to an indigent appellant on his trial appeal deny him equal protection and due process of law by discriminating against him on the basis of wealth?

6. Is an appellant, who remains imprisoned, prejudiced by a prior affirmance of his conviction based on an unauthorized and inadequate appeal?

7. Does a court of appeals have the power to vacate its prior affirmance of appellant's conviction or to set this case down for rehearing?

Statement of the Case

Appellant is an indigent. Too poor to pay for a lawyer of his own choice, he has been represented at every stage of these proceedings by assigned counsel.*

This appeal grows out of appellant's conviction for violating 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A). After a mistrial in December 1974 because a jury could not agree on a verdict, appellant was retried and convicted by a jury in May 1975. On August 18, 1975, Judge Owen -- who had presided at both trials -- sentenced appellant to twelve years' imprisonment to be followed by three years' special parole.

Appellant's Motion to Withdraw The Trial Appeal

On the same day as he was sentenced, appellant was assigned counsel to handle his trial appeal. Two days after sentencing, appellant's newly assigned appellate counsel served a notice of appeal. Appellant met briefly with his newly assigned appellate counsel on the day of sentencing and informed him that, because of his greater familiarity with the facts and his strong feelings about

---

* On this pending appeal appellant was assigned counsel in August 1976 pursuant to the Criminal Justice Act, 18 U.S.C. §3006A.

the legal issues to be raised, appellant wished to conduct his appeal by himself and merely wanted counsel to look over his papers. During his trial he had had a disagreement with assigned trial counsel's tactics, which caused appellant to leave the courtroom.* Appellant was therefore suspicious and distrustful of assigned counsel.

Within a month, on September 17, 1975, appellant, who was by then incarcerated in the Federal Penitentiary in Atlanta, Georgia, filed a pro se motion to withdraw the trial appeal without prejudice.** Appellant and his rejected counsel were not communicating. Rejected counsel did not discuss or consult with appellant about the appeal. Appellant's strong desire to prosecute the appeal as he saw fit led him to move to withdraw the appeal being prepared without the benefit of appellant's advice by rejected counsel. In his motion to withdraw addressed to and filed with the Court of Appeals, appellant asked:

> that he be granted leave to withdraw his/any Appeal that was submitted in/at the Court below (against his will/wishes/desires) by Kirkland Taylor Esq., on/about August 18, 1975. . . .
>
> For cause movant states that the Prosecution of this case did/has both pre-Trial and during

---

* See 535 F.2d at 717.

** Appellant apparently had mailed the pro se motion much earlier. In a letter dated October 9, 1975 to the Court of Appeals, appellant stated that "he caused to be mailed via the U.S. Postal Service" the motion to withdraw "on about the 27, day of August, 1975 [sic]".

> Trial suppressed exculpatory evidence that would have proven movant innocent and, after Trial movant has submitted numerous pleadings requesting and/or moving the Court below that an order be entered directing said Prosecutor/Prosecution to surrender/ furnish said exculpatory evidence unto him whereupon he could properly prepare his appeal and present said issues unto this said Court pursuant to ANDERS V. CALIFORNIA, 386 U.S. 738, 87 S.Ct. 1396, 18 L. Ed. 2 493 (1967).
>
> Movant verly [sic] believes that this motion to withdraw appeal "Without Prejudice" is meritable and Justifiable under existing circumstances and prays this said Court extend him time to submit Truth unto this Esteemed Court:
>
> Wherefore, Movant prays this Esteemed Court give this Matter grave consideration.

Inartful and inelegant as this statement may be, it still articulates unmistakably appellant's reasons for his request to withdraw his trial appeal without prejudice.

The Decision Below

Despite the fact that appellant's motion was addressed to the Court of Appeals, District Judge Owen denied it on November 10, 1975, stating:*

> . . .[I]t appears from subsequent correspondence that petitoner personally directed to the Second Circuit that his basic request is for more time to file an appeal.
>
> Petitioner's appeal, prepared by said court-appointed counsel, has already been submitted to the Second Circuit and is scheduled for oral argument. Petitioner has not in any way questioned its adequacy.

---

* A copy of Judge Owen's order is contained in Appendix A.

> Petitioner asserts, without giving any reasons, that it would be impossible to prepare an appeal in less than six months. I do not regard this as an adequate basis for granting an extension, particularly in view of the fact that an appeal already has been filed.

The "subsequent correspondence" referred to by Judge Owen consists of a letter dated October 9, 1975 to the Court of Appeals in which appellant tries to set forth further reasons for granting his motion to withdraw his trial appeal without prejudice.

While appellant's motion to withdraw the trial appeal was being considered, appellant's rejected counsel was, without consulting or advising appellant, preparing a trial appeal brief that did not include a major argument that appellant wanted raised. On December 4, 1975, appellant received a copy of the brief prepared and filed a month earlier by his rejected counsel*, without ever having previously been apprised of what would be in the brief, and without ever having received a prior draft.** Conspicuously

---

* Rejected counsel had filed his brief on November 12, 1975.

** That brief raised five points: (1) that the district judge who presided over appellant's original trial should not have presided at the retrial; (2) that the trial court erred in refusing to order the government to disclose the identity of the informant involved in the case; (3) that there was no probable cause to justify appellant's arrest; (4) that the search of appellant's suitcase was unlawful; and (5) that the totality of the cirumstances surrounding appellant's retrial denied him a fair trial.

absent from the brief prepared and filed by appellant's rejected counsel was the constitutional argument based on appellant's right to confront and cross-examine the government informant against him, which appellant had repeatedly urged his assigned counsel to make in the brief. The confrontation argument is meritorious and non-frivolous and appellant believed it was going to be made by his rejected counsel. But, without consulting or advising appellant, rejected counsel did not make the confrontation argument, an argument which rejected counsel had no authority from appellant to waive.

Oral argument on the trial appeal occurred on December 12, 1975, only a week after appellant received a copy of the brief filed by his rejected counsel -- without his advice or consultation, much less approval. And so on December 12, 1975 this Court (Oakes, Van Graafeiland and Meskill, Circuit Judges) heard oral argument on the trial appeal, which was prosecuted in direct contravention of appellant's wishes.

The Second Notice of Appeal

On January 20, 1976 -- before this Court rendered a decision on the trial appeal -- appellant first learned that Judge Owen had denied his pro se motion to withdraw his appeal without prejudice when he received notice of the decision while imprisoned in Atlanta.

On February 5, 19.5, appellant filed a pro se notice of appeal from Judge Owen's Order of November 10, 1975 denying his motion to withdraw the trial appeal. No lawyer drafted either the motion or the notice of appeal, but appellant's claim is nonetheless clear:

> That counsel of record i[s] not moving in the best interest of the defendant;
>
> That the Court is aware of this fact and the reasonably effective assistance of counsel [sic];
>
> That petitioner has the right to prepare his own defense.

Appellant further stated:

> That he has informed counsel from the beginning that his appeal would be pro-se [sic] for the fact that the issues and arguments presented could not clearly be raised by counsel. That you petitioner had a full understanding with counsel that his briefs and motions would be filed pro-se [sic] and that counsel would correct any errors if made.
>
> That the Court already has clearly abused your your petitioner[']s right to a fair trial not once but twice in this case and the only defense open in this appeal is for your petitioner to move pro-se [sic] in every action;
>
> Petitioner has the right to defend himself in a court of law and he doe's [sic] not have to take counsel appointed by the court.*

It takes no special expertise or facility in language to divine the basis for appellant's appeal from the District Court's denial of his motion to withdraw his trial appeal

---

* Notice of Appeal filed February 5, 1975.

without prejudice. Appellant filed his pro se notice of appeal for the same reason he originally moved to withdraw his trial appeal: so that he and no one else -- not even a free lawyer assigned by the court -- could prosecute his trial appeal.

Counsel's Failure to Notify Appellant of This Court's Decision

Before counsel was assigned to prosecute the appeal that had been noticed pro se, appellant's conviction was affirmed on May 7, 1976. Judge Meskill's opinion for the Court, reported at 535 F.2d 714 (2d Cir. 1976), was based on the arguments of appellant's rejected counsel, which appellant regarded as incomplete. His rejected counsel did not inform appellant of the outcome of the appeal.* Rejected counsel's consistent pattern of failure to consult and to keep appellant informed is what prompted appellant initially to withdraw his trial appeal.

---

* Appellant did not know that his conviction had been affirmed until his present assigned counsel told him of the affirmance in the course of a telephone conversation of September 9, 1976. A copy of this Court's decision was then sent immediately to appellant. By letter dated September 30, 1976, appellant confirmed to present assigned counsel that he had never been previously informed of this Court's decision on the trial appeal. A copy of appellant's letter is annexed hereto as Appendix B, and counsel shall move prior to oral argument to supplement the record to include the letter. Factual references in this brief are either supported by the record or fairly inferable from it.

Now appellant, through no fault of his own deprived of knowing the status of his own case, is cast in the position of appealing an order denying a motion to withdraw a prior appeal that has already resulted in the affirmance of his conviction.

Summary of Argument

There are three reasons why the District Court should not have denied appellant's motion to withdraw his trial appeal without prejudice: First, appellant's pro se motion was one for voluntary dismissal under Fed. R. App. P. 42, of which the Court of Appeals has sole jurisdiction after an appeal has been docketed. Second, the District Court's denial of appellant's motion to withdraw the trial appeal so that he could prosecute it himself violated appellant's right of self-representation as guaranteed by the Sixth Amendment. Finally, absent adequate reasons, the District Court's refusal to grant appellant's motion to withdraw the trial appeal was an abuse of discretion.

Denial of appellant's motion to withdraw the trial appeal resulted in a denial of effective assistance of counsel on the trial appeal. Appellant's rejected counsel failed to consult appellant fully and to discuss with him appellate tactics, despite appellant's expressed intentions to play a major role in to prosecuting the trial appeal. Rejected counsel, without appellant's prior knowledge or consent, failed to make a non-frivolous contention that appellant wanted stressed on appeal. Further he never informed appellant of the outcome of the trial appeal. Appellate counsel has a duty to confer with his client about appellate tactics,

to inform his client of the outcome of the appeal, and to make arguments that his client wants made to the court using any of several methods to avoid sacrificing professional integrity.

Since appellant did not have enough money to pay for his own lawyer, the ineffectiveness of assistance of counsel provided him resulted in an invidious discrimination based upon indigency. The equal protection component of the Due Process Clause of the Fifth Amendment prohibits invidious discrimination between criminal defendants on the basis of wealth.

This Court's prior affirmance of appellant's conviction does not render this appeal moot. Denial of appellant's constitutional right of self-representation is presumed to prejudice an appellant, and denial of his right to effective assistance of counsel is a denial of fundamental fairness that by definition prejudiced appellant. Moreover, on the trial appeal this Court did not have the benefit of arguments that appellant had a constitutional right to confront and cross-examine the government informant who helped make the case against appellant. And rejected counsel's failure to inform appellant of the outcome of the trial appeal prevented appellant from seeking review in the Supreme Court.

In view of all the circumstances, the affirmance of appellant's conviction should be vacated and appellant

allowed to appeal anew, or, alternatively, the appeal should be set down for rehearing, with rebriefing and reargument on issues not covered on the trial appeal.

ARGUMENT

POINT I

DESPITE ITS LACK OF JURISDICTION EVEN TO CONSIDER THE MOTION, THE DISTRICT COURT DENIED APPELLANT HIS RIGHT OF SELF-REPRESENTATION AND ABUSED ITS DISCRETION

The District Court erred in three ways in denying appellant's pro se motion to withdraw the trial appeal without prejudice. The first flaw is that the District Court lacked jurisdiction to decide that motion. Second, the decision deprived appellant of his constitutional right to prosecute his trial appeal pro se. Finally, the District Court's denial of the motion was arbitrary and capricious and an abuse of discretion.

A. The District Court, Under the Express Language of Fed. R. App. P. 42, Had No Jurisdiction to Consider Appellant's Motion to Withdraw the Trial Appeal.

Appellant's pro se motion to withdraw the trial appeal without prejudice, however inartfully drawn, was addressed to this Court, not the District Court, to be determined under Rule 42 of the Federal Rules of Appellate Procedure dealing with voluntary dismissals of appeals:

> (a) Dismissal in the District Court. If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant [emphasis supplied].

> (b) Dismissal in the Court of Appeals. If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

Since a notice of appeal had already been filed and the appeal had been docketed, the District Court had no authority to decide appellant's motion*. Rule 42 of the Federal Rules of Appellate Procedure implies that the Court of Appeals has exclusive jurisdiction over such a motion. See Lott v. United States, 218 F.2d 675, 676 (5th Cir. 1955), cert. denied, 351 U.S. 953 (1956) (district court has no authority under predecessor of Fed. R. App. P. 42 to dismiss criminal appeal after notice of appeal filed).

B. The District Court's Order Deprived Appellant of His Constitutional and Statutory Right to Prosecute His Trial Appeal Pro Se.

Appellant wanted to withdraw his trial appeal without prejudice because he was dissatisfied with the way it was being handled by his rejected counsel; appellant thought he

---

* One of the District Court's reasons for denying the motion was the fact that the trial appeal "has already been submitted to the Second Circuit and is scheduled for oral argument." Rather than justify denial of the motion, this fact shows why the District Court lacked jurisdiction to consider the motion.

could do a better job himself.*

Denial of appellant's motion forced counsel upon him, despite his insistence on conducting his own appeal, thereby violating appellant's right of self-representation, Faretta v. California, 422 U.S. 806 (1975). In Faretta, the Supreme Court held unequivocally that the Sixth Amendment "implies a right of self-representation."

> We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .
>
> The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which it emerged. Id. at 817-18.

In Faretta, where a state criminal proceeding was involved, the Supreme Court noted (Id. at 812), "In the federal courts, the right of self-representation has been protected by statute since the beginning of our Nation" [emphasis supplied]. Originally spelled out in Section 35

---

* Appellant's motion explicitiy asks "that he be granted leave to withdraw his/any Appeal that was submitted in/at the Court below (against his will/wishes/desires) by Kirkland Taylor, Esq., on/about August 18, 1975." Appellant's notice of appeal from denial of his motion to withdraw the trial appeal also spells out his desire to conduct the appeal by himself. In light of these express indications of appellant's desire, Judge Owen's interpretation of appellant's letter of October 9, 1975 is wrong. Appellant's "basic request" was not, as Judge Owen characterized it, "for more time to file an appeal." On the contrary, appellant's "basic request" was for the right to conduct his own appeal by himself.

of the Judiciary Act of 1789, 1 Stat. 73, 92, the right is currently codified in 28 U.S.C. §1654:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

The Supreme Court in Faretta relied upon two decisions from this Court: United States v. Plattner, 330 F.2d 271 (2d Cir. 1965), and United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966). In Plattner Circuit Judges Medina, Waterman and Marshall held that a defendant on the trial of a criminal case, including a coram nobis proceeding, has a right to conduct and manage his own case pro se. Writing for this Court in Plattner, Judge Medina pointed out that the safeguard of the Sixth Amendment right to counsel

> was surely not intended to limit in any way the absolute and primary right to conduct one's own defense in propria persona. Nor is the existence of this right made doubtful by the circumstance that the now all but universal requirement of the assignment of counsel to indigent defendants and more enlightened views. 330 F.2d at 274.

In support Judge Medina cited Section 35 of the Judiciary Act of 1789 and 28 U.S.C. §1654, and also referred to Fed. R. Crim. P. 44, which now provides:

> (a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance through appeal, unless he waives such appointment [emphasis added].

Judge Medina therefore concluded that the "statutes and rules now in force" reaffirm "the continued vitality of the Constitutional right to conduct one's own defense without the intervention of an assigned attorney." Id.

Plattner was soon followed by Maldonado in which Circuit Judge Waterman, speaking for himself and Circuit Judges Friendly and Smith, approved the decision in Plattner and added (348 F.2d at 15):

> This right of an accused to defend himself, as we conceive it, rests on two bases. . . . He "must have the means of presenting his best defense," and to this end he "must have complete confidence in his counsel." Without such confidence a defendant may be better off representing himself. Moreover, even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open."

The Supreme Court expressed the same concern in Faretta, 422 U.S. at 834:

> . . . [W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instance, the defendant might in fact present his case more effectively by conducting his own defense.

The principles of Faretta, Plattner and Maldonado require this Court to hold that appellant was denied his right of self-representation on the trial appeal. See also

United States v. O'Clair, 451 F.2d 485 (1st Cir. 1971), cert. denied, 409 U.S. 986 (1972) (indigent appellant entitled to conduct his own appeal).

C. The District Court's Denial of Appellant's Motion Was An Abuse of Discretion Because It Was Arbitrary and Capricious And No Reason Justified Denial.

There was no reason for denial of appellant's motion: (1) the government did not oppose it; (2) any consequent delay would not have been serious; and (3) appellant was competent to make the decision to withdraw the appeal without prejudice. See Henderson v. United States, 360 F.2d 514 (D.C. Cir. 1966) (granting unopposed motion by competent defendant to withdraw appeal).

The reasons given by Judge Owen for denying the motion are inadequate. Appellant's "basic request" was not for more time to file an appeal, but for the right to prosecute his trial appeal pro se. Although rejected counsel had submitted the trial appeal brief to this Court by the time Judge Owen decided appellant's motion (November 10, 1975), appellant's motion had been filed since September 17, 1975 and it is unfair to penalize him for the ongoing delay. Nor can appellant fairly be blamed for not questioning the adequacy of a brief that he had been shown.

POINT II

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON THE TRIAL APPEAL BECAUSE REJECTED COUNSEL FAILED TO CONSULT FULLY WITH APPELLANT; REFUSED, WITHOUT APPELLANT'S KNOWLEDGE OR CONSENT, TO MAKE A NON-FRIVOLOUS CONTENTION THAT APPELLANT WANTED MADE ON APPEAL; AND FAILED TO INFORM APPELLANT OF THE OUTCOME OF THE TRIAL APPEAL

The District Court's denial of appellant's motion resulted in legal representation for appellant on the trial appeal that was unwanted, inadequate and ineffective.

In the first place, appellant's rejected counsel failed to consult with and advise appellant regarding the appeal, let alone allow appellant to have a significant role in the conduct of his own appeal as appellant stated he wished to do. Rejected Counsel did not discuss strategy, tactics or issues. At their only face-to-face meeting, on the date of sentencing, appellant told his rejected counsel that he wanted to prosecute the appeal pro se, and that he merely wanted counsel to comment on his work. Ignoring this statement from appellant, rejected counsel proceeded to brief and argue the trial appeal without even consulting his client.

Even after appellant filed his motion to withdraw -- in which appellant's wish to proceed pro se was officially set forth -- his rejected counsel refused to heed appellant's instructions that counsel press the contention that at trial

appellant's constitutional right to confront the witnesses against him was violated because he was not permitted to cross-examine the government informant.

Rejected counsel did not show appellant drafts of the trial appeal brief, and thereby afforded him no opportunity to comment on the brief. Counsel merely sent appellant a copy of the brief he had already filed a month earlier with this Court.

The final indicium of rejected counsel's inattention to his client is his to failure to inform appellant of the outcome of the trial appeal had prosecuted for appellant.

These undisputed facts bear witness to ineffectiveness of advocacy in the federal courts, a source of increasing concern recently articulated by the Chief Judge of this Court:

> As courts' tasks have multiplied, so in an equal measure the obligation of the trial and appellate bars to act as trained and informed counsel has increased. Unfortunately, that duty is sometimes ignored or rejected, and judges are increasingly troubled by the growing number of instances of poor legal representation encountered even in our nation's highest courts.

Kaufman, "Does the Judge Have a Right to Qualified Counsel?" 61 A.B.A.J. 569 (1975). Chief Judge Kaufman gave an example with particular relevance to this case:

> I have found it necessary on several occasions to criticize irresponsible behavior by counsel. One brief submitted by a lawyer in a habeas corpus case this term was so poor that the prisoner himself had to write and file his own brief in its place.

Id.; see also United States v. Williams, 411 F.Supp. 854 (S.D.N.Y. 1976) (denying motion to dismiss indictment following mistrial caused by incompetent counsel); Burger, "The Special Skills of Advocacy," 42 Fordham L. Rev. 227 (1973); Bazelon, "The Defective Assistance of Counsel," 42 U. Cin. L. Rev. 1 (1973).

The Sixth Amendment speaks of a defendant's right to "assistance of counsel," and Powell v. Alabama, 287 U.S. 45, 65 (1932), defined the right to mean "effective assistance" of counsel.*

Demonstrating ineffectiveness of counsel is difficult. In United States v. Joyce, ___ F.2d ___ (2d Cir. Sept. 20, 1976) Dkt. No. 76-1182, Slip Op. at 4, this Court said:

> For over a quarter of a century this court has adhered to stringent requirements to establish a claim of ineffective assistance of counsel, United

---

* Whether or not there is a constitutional right to an appeal, see Griffin v. Illinois, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring), there is no doubt that appellate review is wise, see Coppedge v. United States, 369 U.S. 438, 455-56 (1962) (Stewart, J., concurring) ("Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial"), and that if the right of appeal exists it must meet the constitutional requirements of equal protection and due process. Accordingly courts have mandated that indigents be provided necessary incidents of appeal, including free transcripts, Griffin v. Illinois, supra, and free assistance of counsel, Douglas v. California, 372 U.S. 353 (1963).

States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); Lunz v. Henderson, 533 F.2d 1322 (2d Cir. 1976).

To justify reversal of a proceeding, the assistance complained of must have been so ineffective as to "shock the conscience of the Court and make the proceeding a farce and a mockery of justice," United States v. Wight, supra, 176 F.2d at 379, or "so 'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his client's interests,'" United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971).*

At the same time, however, this Court has said that it is "aware that other circuits have relaxed the standards for concluding that ineffective assistance was rendered by counsel" and, in United States v. Joyce, ___ F.2d ___, supra, Slip Op. at 4, cited those "less rigid standards" in rejecting a claim of ineffectiveness of counsel.

---

* See also United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972); United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971); United States v. Katz, 425 F.2d 928, 930-31 (2d Cir. 1970); United States v. Silva, 418 F.2d 328, 331-32 (2d Cir. 1969); United States v. Currier, 405 F.2d 1039, 1042-43 (2d Cir.), cert. denied, 395 U.S. 914 (1969); United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967); United States ex rel. Boucher v. Reincke, 341 F.2d 977, 981-82 (2d Cir. 1965); United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964); United States v. Garguilo, 324 F.2d 795, 796-97 (2d Cir. 1963); United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963).

The present case meets this Court's standards to support a claim of ineffective assistance of counsel. It also presents additional factors that make adoption of less rigid standards fitting.

A crucial factor in the pending appeal, distinguishing it from many claims of ineffectiveness of counsel, is that appellant made his claim at the outset of the trial appeal, not as a result of hindsight. Ordinarily a defendant complains about counsel's effectiveness after the conviction.

> A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompentence.

United States v. Joyce, ___ F.2d ___, supra, Slip Op. at 5, quoting United States v. Garguilo, 324 F.2d 795, 797 (2d Cir. 1963). In the instant case, however, appellant moved to have his trial appeal withdrawn so that he could represent himself before the trial appeal was presented or decided, and before his conviction was affirmed. By so moving, appellant asked for this Court's help early on.

The standards for a claim of ineffectiveness of counsel should be less rigid when the claim, as here, is asserted as the conduct is occurring. Although the "mockery of justice" test may still apply to claims that materialize subsequent to an adverse result, a more appropriate rule for

claims raised before there is a motive to place blame would be whether counsel's assistance has caused the defendant to forego some significant right, regardless of whether or not foregoing that significant right changed the outcome of the proceeding. The suggested test would put a premium on early assertion of the claim and assumes that the court conducting the proceeding will be in the best position to evaluate the claim initially. On the other hand, if the claim is rejected, a reviewing court will be free to decide for itself -- without the constraints of a rigid threshold level of horror and a stringent requirement that the outcome would have been different -- if a defendant has received ineffective assistance of counsel. Such a rule is fair and reasonable, imposes no great administrative hardship on the judicial process, and does not disturb the rule with respect to after-the-fact claims of ineffectiveness of counsel. It is a more discriminating way of analyzing claims of ineffectiveness of counsel, and reinforces and complements the logic behind stringent requirements for such claims as arise as afterthoughts.

Close analysis of the claims pressed on this pending appeal show that they meet both the "mockery of justice" test as well as the proposed "loss of significant right" test. The claims are not based solely on rejected counsel's ineptitude,

but also are grounded in breaches of ethical and professional duties.

Duty to Consult. Appellant's rejected counsel did not comply with his duty to confer with his client as often as necessary and to discuss fully potential strategies and tactical choices. Appellant's rejected counsel totally ignored this duty, owed to indigent and paying clients alike. See ABA Standards Relating to the Defense Function §8.2 Commentary at p. 290 (Approved Draft 1971).

In United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967), this Court found denial of effective assistance where counsel either failed to move to set aside a guilty verdict, or, knowing that an appeal was meritorious and that his client had requested an appeal, failed to perfect an appeal. The Court pointed out that the fact that "counsel here consulted with his client is not ground for distinguishing these cases [where counsel's falure to consult led to bona fide claims of ineffectiveness of counsel]." 383 F.2d at 132 n. 3. The Court in Maselli clearly implied that failure to consult a fortiori made the claim stronger. Maselli quoted* with approval from Wainwright v. Simpson, 360 F.2d 307, 309-310 (5th Cir. 1966):

> However laudable his motive, court appointed counsel for Simpson had no authority, without

---

* 383 F.2d at 132-133.

> consulting with or obtaining the consent of his client, deliberately to forego Simpson's right to move for a new trial or to appeal. When he did so, he proved himself ineffective. More, he completely abdicated his function and deprived Simpson of the aid of any counsel at a critical stage of the criminal proceeding. [footnotes omitted]

Appellant's right to be consulted is definite and recognized -- with, employing the Hohfeldian model, a correlative duty on the part of counsel. See United States ex rel. Randazzo v. Folette, 444 F.2d 625, 629 (2d Cir.), cert. denied, 404 U.S. 916 (1971); ABA Code of Professional Responsibility EC 7-8.*

Duty to Advocate. Without consulting appellant, without discussing the pros and cons with appellant, and without even advising appellant of his choice, rejected counsel made no argument based on appellant's right to confront his accusers, to cross-examine the government informant who played such a vital role in the case against him. Appellant had urged his rejected counsel to make such an argument on appeal.

In cases where counsel and client differ as to the merits of an appellate argument, one court stated that,

> guidelines are badly needed by counsel as well as litigants. The Canons of Professional Ethics of the American Bar Association furnish but limited practical guides in the twilight zone with which we are confronted.**

---

* Set out in Appendix C.

** Some of the relevant portions of the Canons are set forth in Appendix C.

Gallegos v. Turner, 256 F.Supp. 670, 674 (D. Utah 1966), aff'd, 386 F.2d 440 (10th Cir. 1967), cert. denied, 390 U.S. 1045 (1968) (appellate counsel told court that appeal lacked merit).

Gallegos was decided a year before the Supreme Court's decision in Anders v. United States, 386 U.S. 738 (1967), in which the Supreme Court shed some light on the issue.

Anders involved an indigent who appealed his conviction by a state court, was granted a free transcript and appointed counsel, who later wrote a short letter to the appellate court saying that he would not file a brief because he believed there was no merit to the appeal. The state court permitted the indigent in Anders to file a brief in his own behalf, but refused to appoint another lawyer for him. Ultimately the Supreme Court held this procedure was unconstitutional.

The Supreme Court in Anders said:

> His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.
>
> . . . The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. 386 U.S. at 744.

Anders therefore requires counsel not to discharge an obligation in summary fashion, but to provide the reviewing court with meaningful assistance. Moreover,

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. Id.

Anders means that assigned counsel must represent his client effectively and present his client's case in the best possible manner. Although Anders may not resolve completely the precise issue raised on this appeal, it surely articulates some of the important relevant values and indicates that those values press in appellant's favor on this pending appeal.

This Court has not decided the precise issue either. In United States ex rel. Johnson v. Vincent 507 F.2d 1309 (2d Cir. 1974), cert. denied, 420 U.S. 994 (1975), this Court did not reach the merits of a constitutional claim of ineffective assistance of counsel where appellate counsel failed to raise a questionable point of state law. This Court "note[d] in passing that we would have difficulty, on the record before us, in upholding the determination of the district court that" counsel's failure met the standards for ineffective assistance of counsel. Id. at 1312 n. 7. But the instant case differs in several respects from Johnson. Mere failure to raise a questionable point, without more, is one thing; failure to raise such a point without consulting appellant when counsel

knew appellant wanted the point raised is another, more serious matter altogether.*

Nor have other circuits considered at length the particular question under review. In a per curiam decision, the First Circuit in United States v. O'Clair, 451 F.2d 485 (1st Cir.), cert. denied, 409 U.S. 986 (1971), denied a motion by a defendant for dismissal of his assigned counsel, for the appointment of new counsel (designated by defendant), and for a continuance of his appeal. The Court of Appeals said that it "recognize[d] no such principle" that

> counsel are simply formal agents to conduct their case in accordance with decisions made by the defendants. . . . A defendant is free to offer advice to his appellate counsel, who may or may not act upon it as he, in his judgment may decide . . . He may make written suggestions to counsel, but counsel is under no duty to accept them, or even to explain, unless he wishes to, why he does not. 451 F.2d at 486.

The First Circuit did not cite any authority for its position, nor did it analyze how Anders affected its rationale. Moreover, unlike the instant appeal, O'Clair did not involve a situation where the defendant requested to conduct the appeal himself; in such a situation the First Circuit acknowledged an appellant's right to represent himself. Id.

The Seventh Circuit, in Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), upheld the validity of a letter

---

* The district court opinion reveals that counsel in Johnson never spoke or consulted with his client. 370 F.Supp. 379, 385 (S.D.N.Y. 1974).

from assigned appellate counsel which stated that "after careful perusal of the record and of the law, I can find no possible merit in the appeal." The Court of Appeals there analyzed Anders but did not read the Supreme Court's decision "as requiring appointed counsel to make arguments that he would not consider worthy of inclusion in a brief submitted on behalf of a paying client." 454 F.2d at 471. The Seventh Circuit's reading of Anders does not foreclose the issue, because the factual context in the present case is both so different and so much more aggravated, and because there are other values and factors to be considered.*

Judge Christensen's opinion in Gallegos, supra, 256 F.Supp. 670, still stands as the most elaborate and instructive judicial authority directly on point:

> Except under extraordinary circumstances, [counsel's duty to present to a court the contentions of clients that are relevant and not patently frivolous] cannot be discharged by the abandonment of these contentions where the client has the right to have them appropriately adjudicated by a court. If a claim is patently frivolous it should not be submitted for adjudication, but being before the court it ordinarily harmonizes with our adversary system for that determination to be made by the court rather than by counsel, especially in case of assigned counsel acting without the consent of his client.

---

* This Court has also had occasion to interpret Anders, but not in the particular setting presented in the pending appeal. See, e.g., United States v. Fisher, 442 F.2d 1018 (2d Cir. 1971); United States v. Camodeo, 383 F.2d 770 (2d Cir. 1967).

> This does not mean that counsel, whether representing an indigent or a person of means, may present arguments or maintain positions as his own which are dishonorable or devoid of merits. Candor and frankness toward the court are to be expected and esteemed. But neither is it the province of counsel to substitute his opinions as to the merits of his client's cause for a judicial determination.... Nor is it permissible in granting the right to counsel to deny an indigent the right to any judicial determination at all. Counsel has the duty, unless the contentions of his client are clearly frivolous, to present them to the court fairly for whatever merit they may possess and in the manner best calculated to obtain for them a hearing and consideration by the court which has the ultimate responsibility of deciding their merit.

Gallegos v. Turner, supra, 256 F.Supp. at 675-6 n.5.

Rejected counsel's dereliction here was exacerbated by his complete failure to consult with appellant about the choice not to make the confrontation argument. See United States ex rel. Maselli v. Reincke, supra, 383 F.2d at 132-133; Wainwright v. Simpson, supra, 360 F.2d at 309-310.

Consultation and discussion with the client are vital. Assigned counsel should not too quickly come to the conclusion that a contention is frivolous. ABA Standards Relating to Criminal Appeals §3.2 Commentary at p.76 (Approved Draft 1970). Nor should assigned appellate counsel reject an argument as frivolous simply because it does not comport with existing doctrine... There may be a basis for arguing for change in the law. See id. As Judge Christensen stated in Gallegos,

supra, 256 F.Supp. at 676 n.5:

> If all views ultimately upheld by the courts had to have been initially approved as their own by all counsel exposed to them in earlier stages of the case, many vital constitutional principles now taken for granted would never have been considered by appellate courts in the first instance, and particularly would not have been considered or ruled upon favorably by the Supreme Court.

See also Anders v. California, 386 U.S. 738 (1967); Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968); Harders v. California, 373 F.2d 839 (9th Cir. 1967); Johnson v. United States, 360 F.2d 844, 847 (D.C. Cir. 1966) (Burger, J., concurring); Leventhal, "What the Court Expects of the Federal Lawyer," 27 Fed. B.J. 1 (1967).

There are, moreover, several devices whereby counsel can advance the client's contentions without compromising his professional ethics if he disagrees with those contentions. Counsel can treat the point briefly and not press it on oral argument. See ABA Standards Relating to Criminal Appeals §3.2 Commentary at p.79 (1970). Counsel may also present the grounds without endorsing them but at the same time without disparaging them, id., or admit that he can find no supporting authority. Gallegos, supra, 256 F.Supp. at 679 n.6.*

---

* It sustains rather than derogates against our profession if counsel presents the contentions of his client as such, even though he does not personally underwrite then as his own. It may not be according an indigent defendant his right to counsel or the equal protection of the laws to tell counsel generally as we do in the Canons of Professional Ethics, that it is improper to express

(Footnote Continued)

And, of course, counsel may always withdraw from the case, although even then he must take steps not to prejudice the client's interests. See Anders v. California, 386 U.S. 738 (1967).

In view of these alternatives, Judge Christenson concluded that

> . . . an advocate should present the contentions of his client in their best possible light as his client's contentions if he is not in a position to present them as his own, particularly when these contentions are the only matters before the court. I do not believe that there necessarily must be a conflict between honorable representation and conviction on the part of counsel that ultimately the representation may not be successful. I believe within the guidelines indicated above, an attorney's duties to his client and the court both may be properly performed. If they cannot be, we must drastically revise our commitment to the adversary system of justice and to due process itself, as these have been understood up to this time.

Gallegos, supra, 256 F.Supp. at 677 n.6.

Assigned counsel must not confuse his role with that of a judge or an amicus. Anders v. California, 386 U.S. 738, 744 (1967). Assigned counsel is, under our system of justice, an advocate, and just as, "In our adversary

(Footnote Continued)

> in argument a personal opinion concerning a defendant's guilt or innocence, and yet to expect counsel to deny his client access to the independent judgment of the court by reason of counsel's own expressed belief that his client's contention does not possess sufficient merit to justify hearing. Within the requirements of self respect, honor and fairness, there is place for every shade and type of advocacy, and in no sense must it amount to a confessional.

Gallegos, supra, 256 F. Supp. at 679 n. 6.

system, it is enough for judges to judge," Dennis v. United States, 384 U.S. 855, 874-75 (1966), so too it is enough for advocates to advocate.*

In light of "the basic principles of fairness in respect to both our adversary and judicial systems,"** appellant's rejected counsel's failure, without appellant's prior knowledge or permission, to assert appellant's confrontation argument constitutes a "mockery of justice" and amounts to "a breach of his legal duty faithfully to represent his client's interests"; and certainly satisfies any less stringent standards.

---

* The problem and tension are old, as the following exchange between Boswell and Johnson demonstrates:

> Boswell: "But what do you think of supporting a cause which you know to be bad?"
>
> Johnson: "Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

Quoted in Rifkind, "The Lawyer's Role and Responsibility in Modern Society," 30 The Record 534, 538 (1975).

** Gallegos, supra, 256 F.Supp. at 678.

Duty to Notify. Rejected counsel's failure to notify appellant of the outcome of the appeal is inexplicable and totally unjustifiable. It violates §3.8 of the ABA Standards Relating to the Defense Function (Approved Draft 1971):

> The lawyer has a duty to keep his client informed of the developments in the case and the progress of preparing the defense.

Similarly, EC 9-2 of the ABA Code of Professional Responsibility provides:

> In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.

A failure to inform a client of the results of his appeal is a great violation of an attorney's duty to his client.

* * *

Appellant was deprived of various rights because of his rejected counsel's derelictions. "Fundamental fairness," said this Court in United States ex rel. Maselli v. Reincke, supra, 383 F.2d at 134, "requires that [an appellant] be granted the rights that were lost to him through no fault of his own." See also Mosher v. LaVallee, 491 F.2d 1346 (2d Cir.), cert. denied, 416 U.S. 906 (1974) (effective assistance of counsel denied where guilty plea resulted from counsel's objective error).

POINT III

THE INADEQUATE LEGAL REPRESENTATION GIVEN THIS INDIGENT APPELLANT ON THE TRIAL APPEAL UNLAWFULLY DISCRIMINATED AGAINST HIM ON THE BASIS OF WEALTH, THEREBY DENYING HIM EQUAL PROTECTION AND DUE PROCESS OF LAW

The equal protection component in the Due Process Clause of the Fifth Amendment "prohibit[s] the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497 (1954)." Washington v. Davis, 96 S.Ct. 2040, 2047 (U.S. June 7, 1976). To reject the claim of appellant here, in the words of this Court in Maselli (383 F.2d at 134),

> would result in invidious discrimination against indigent defendants. As "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has'", Douglas v. California, 372 U.S. 353, 355, (1963), quoting from Griffin v. Illinois, 351 U.S. 12, 19 (1956), we must seek to "assure penniless defendants the same rights and opportunities on appeal--as nearly as is practicable--as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." Anders v. California, 386 U.S. 738, 745 (1967).

Here, as in Maselli, the loss of appellate rights was occasioned by appellant's indigency which caused his representation by rejected counsel, not of his own choosing, who was totally ineffective. Had he been financially able to employ private counsel on appeal, appellant would have been consulted about tactics, would have had his wishes considered,

and certainly would have been informed of the outcome of his appeal.

Indigent defendants are entitled to the same rights of effective assistance of counsel as wealthy defendants. See, e.g., Norvell v. Illinois, 373 U.S. 420 (1963); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).*

---

* See also Gallegos, supra, 256 F.Supp. at 675 n.5, where Judge Christensen pointed out:

> Attorneys appointed to represent those who by reason of their financial condition are unable to employ counsel are held to substantially the same obligations toward their clients as employed counsel. And a "public defender" generally is under the same obligation of defending an accused as an employed attorney.... If placed in an essentially different position, the appointment of counsel to "help" a financially incompetent accused might be a detriment rather than an aid and thus only accentuate an invidious discrimination by reason of financial condition.

POINT IV

THIS COURT'S PRIOR AFFIRMANCE OF APPELLANT'S CONVICTION DOES NOT MOOT THIS APPEAL BECAUSE APPELLANT WAS PREJUDICED BY THE DENIAL OF HIS CONSTITUTIONAL RIGHTS ON THE TRIAL APPEAL

The prejudice suffered by appellant as a result of the denial of his constitutional rights of self-representation and effective assistance of counsel on the trial appeal survives this Court's prior affirmance of appellant's conviction.

With respect to denial of appellant's right of self-representation, this Court ruled in Plattner, supra, 330 F.2d at 273, that such a denial in a trial setting requires automatic remand without further inquiry. As Judge Medina said in Plattner:

> Moreover, we hold that the right to act pro se as above stated is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision. Thus we would be required to remand the case, even if no prejudice to Plattner were shown to have resulted from the refusal to permit him to act pro se. Id.

This Court's prior affirmance does not, given the remand rule of Plattner, render this pending appeal moot.*

---

* Plattner is in accord with the decision in Chapman v. California, 386 U.S. 18, 23 (1967), that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error."

A similar rule applies to denial of appellant's right to effective assistance of counsel where, as here, the harm amounts to a denial of fundamental fairness. In United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 161 n. 13 (2d Cir. 1973), this Court quoted its previous pronouncement in Maselli, supra, 383 F.2d at 133 n. 4, that:

> where the constitutional error is a denial of fundamental fairness, and threatens the integrity of the fact evaluation and guilt adjudication process itself, there is by definition obvious prejudice.

The Haynes-Maselli rule controls here because of the totality of circumstances surrounding the ineffective assistance rendered to appellant by rejected counsel.

Rejected counsel's conduct deprived this Court of the benefit of argument -- which appellant wanted made -- on the issue of whether appellant had a constitutional right under the Sixth Amendment to confront and cross-examine the government informant who aided the prosecution. Although the rights of confrontation and cross-examination may not be co-extensive,* the Confrontation Clause does guarantee the right to "full and effective" cross-examination of available witnesses. Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Pointer v. Texas, 380 U.S. 400 (1965). For cross-examination

---

* Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970).

to be "full and effective," a defendant must have an opportunity for "testing the recollection and sifting the conscience of the witness." Mattox v. United States, 156 U.S. 237, 242 (1895). A colorable, non-frivolous and more fully developed argument along these lines could and should have been presented to this Court. This Court's decision rejecting the argument that appellant was entitled to know the identity of the informant (535 F.2d at 718, 720) is not dispositive of the confrontation issue, if only because this Court's decision on that point was limited to the contexts of disclosure vis-a-vis appellant's possible defenses and vis-a-vis "probable cause" for an arrest, and was not informed by the relevant constitutional arguments regarding confrontation. Those substantial constitutional arguments need to be made in this case, and appellant should have an opportunity to make them in full-dress fashion on another appeal.

Another item of palpable prejudice flows from rejected counsel's failure to notify appellant of the outcome of the trial appeal. Appellant was time-barred from seeking Supreme Court review of this Court's prior decision solely because of rejected counsel's neglect. Rule 22(2) of the Rules of the Supreme Court requires a petition for certiorari in a case such as this to be filed within 30 days of this Court's decision.

Finally this Court cannot blink reality and ignore the fact that appellant remains imprisoned as a result of this Court's prior decision.

The pending appeal is not moot.

POINT V

THIS COURT HAS THE POWER TO VACATE ITS PRIOR AFFIRMANCE OF APPELLANT'S CONVICTION SHOULD OR TO SET THIS CASE DOWN FOR REHEARING

It is undisputed that appellant, through no fault of his own, was not notified of this Court's decision on his trial appeal (decided May 5, 1976) until September 9, 1976. Rejected counsel simply failed to inform appellant.

It is similarly undisputed that appellant's rejected counsel failed to present an important and non-frivolous contention that appellant wanted presented to this Court.

In these circumstances this Court's prior affirmance of appellant's conviction should be vacated and a new appeal allowed.

Alternatively, this case should be set down for rehearing pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure.*

In Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2nd Cir.), cert. denied, 400 U.S. 829 (1970), this Court allowed a petition for rehearing several months after its decision because of an intervening state decision, saying:

---

* "A petition for rehearing may be filed with 14 days after entry of judgment unless the time is shortened or enlarged by order" (emphasis added).

> It seem clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired. See United States v. Certain Land, 420 F.2d 370 (2d Cir. 1969) (deleting award of interest three months after original decision). See also National Comics v. Fawcett, 198 F.2d 927 (2d Cir. 1952) (court of appeals may change and modify mandate of prior term). Accord, United States v. 63.04 Acres of Land, 257 F.2d 68, 69 (2d Cir. 1958).

As applied to the facts in this case, it would be "in the interests of justice," id. at 430, to set this case down for rebriefing and reargument limited, if this Court so determines, to issues not raised on the trial appeal.

Conclusion

For the reasons given, this Court should vacate its prior affirmance of appellant's conviction and allow a new appeal. Alternatively, this Court should order that this appeal be set down for reargument and rebriefing limited to issues not raised on the first appeal.

Dated: New York, New York
October 26, 1976

Respectfully submitted,

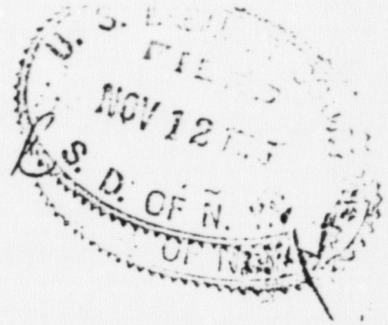
DANIEL J. KORNSTEIN
BAER & McGOLDRICK
Attorneys for Defendant-Appellant
460 Park Avenue
New York, New York 10022
(212) 758-0404

Daniel J. Kornstein,
Of Counsel

APPENDICES

PROCEEDINGS

APPENDIX A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

WYADELL EDMONDS,

Defendant.

---

74 Cr. 474

ORDER

OWEN, District Judge.

Petitioner Wyadell Edmonds, who has assigned counsel, has pro se filed a motion to withdraw his appeal without prejudice. It appears from subsequent correspondence that petitioner personally directed to the Second Circuit that his basic request is for more time to file an appeal.

Petitioner's appeal, prepared by said court-appointed counsel, has already been submitted to the Second Circuit and is scheduled for oral argument. Petitioner has not in any way questioned its adequacy.

Petitioner asserts, without giving any reasons, that it would be impossible to prepare an appeal in less than six months. I do not regard this as an adequate basis for granting

an extension, particularly in view of the fact that an appeal already has been filed. The motion to withdraw his appeal without prejudice is denied.

SO ORDERED:

United States District Judge

November 10, 1975.

APPENDIX B

WYADELL EDMONDS
#80781-158
BOX PMB
ATLANTA, GEORGIA 30315

SEPTEMBER 30, 1976

MR. DANIEL J. KORNSTEIN
460 PARK AVENUE
NEW YORK, NEW YORK
10022

Dear Mr. Kornstein:

First and foremost, I sincerely beg your forgiveness and indulgence, for the late response to your letter of September 9, 1976.

I must say that even though you had informed me via telephone that a decision had been reached by the Court of Appeals in my case, I still found it unbelievable, even though I had the enclosed decision in my hand.

I have the following questions: Assuming the appeal is vacated, will the issue of ineffective counsel be sent back to the District Court?; if so, would the original trial judge decide the issues?; would I be entitled to bond?; lastly, what form of relief could I expect, regarding release from confinemnet?

I enjoyed talking to you over the phone. All and all, you have a kind and friendly voice and you write with the same expression. It was a pleasure to hear from you. In the near future, I will acknowledge all correspondence from you, timely.

Very truly yours,

Wyadell Edmonds

APPENDIX C

Canon 7 of the ABA Code of Professional Responsibility provides that: "A lawyer should represent a client zealously within the bounds of the law." Some of the Ethical Considerations regarding Canon 7 include:

EC7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public or judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions of his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

Duty of the Lawyer to the Adversary System of Justice

EC7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same; to represent his client zealously within the bounds of the law.